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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOEL PAEZ SERNA, Defendant and Appellant.	H033227 (Santa Clara County Super. Ct. Nos. CC647999 & CC753922)

Following denial of his motions to traverse and quash the search warrant and suppress evidence (Pen. Code, § 1538.5), defendant pleaded no contest to various drug and other offenses charged in two informations. Imposition of sentence was suspended and defendant was placed on two concurrent three-year probationary terms.

The evidence against defendant was seized pursuant to a search warrant based upon information provided by a confidential informant and contained in the sealed portion of the supporting affidavit. The magistrate held an in camera hearing in ruling on defendant's motions. On appeal, defendant complains that the trial court "did not follow the step-by-step procedural dictates" of *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*). He requests that this court "review the sealed transcripts to determine whether the lower court abused its discretion by conducting the in-camera review in a manner not consistent with the dictates of *Hobbs*, and whether the search warrant leading to [defendant's] arrest

was in fact based on probable cause." We have reviewed the sealed affidavit and transcript of the in camera hearing. Finding no basis for reversal under *Hobbs,* we will affirm.

FACTUAL AND PROCEDURAL HISTORY

On May 8, 2006, San Jose Police Officer Michael Roberson requested a warrant authorizing the search of (1) the premises at 1919 Fruitdale Avenue, apartment H213, in San Jose; (2) defendant's person; and (3) a 1989 BMW automobile and all its containers. The search warrant was supported by Roberson's affidavit, in which he set forth his experience and training with respect to methamphetamine and its precursors. In his affidavit, Officer Roberson also stated that "X", a confidential informant who had never provided information before, was aiding him in his investigation of the possession for sale of phenylacetone at the Fruitdale address. The officer asked the court to assume, for the purposes of the affidavit, that "X" had prior felony convictions and pending charges. Officer Roberson admitted that he told "X" he would "speak to criminal justice officials and advise them of X's cooperation and assistance in the investigation," but that no other compensation or inducements or promises had been given to "X." According Roberson, 10 days prior to the affidavit, the informant "told [him] in confidence of drug activity contemporaneously occurring in Santa Clara County." The information from "X" was set forth in a separate affidavit marked "Exhibit A" which was submitted to the court for confidential review. Officer Roberson asked that "Exhibit A" be sealed to protect "X" 's usefulness as an informant and his safety.

The affidavit also set forth that within the previous 10 days, Officer Roberson had checked DMV and criminal history records for defendant and had discovered matching physical descriptions for defendant; a BMW automobile jointly registered to defendant

and a woman sharing the same surname at the Fruitdale address; and multiple convictions for Health and Safety Code violations for defendant.

Within the previous 10 days, Roberson and another officer had gone to the Fruitdale address, where Roberson had smelled "a strong chemical odor coming from the door at Apartment Number H213" which he recognized as "consistent with that of old-fashion methamphetamine." Contact had been made with the California Department of Justice laboratory about this observation, and the officers had learned that phenylacetone sometimes resembles peanut brittle and has a strong chemical odor consistent with "old-fashion methamphetamine." Because in Roberson's experience controlled substances can be and often are transported and stored in cars, Roberson requested permission to search the listed automobile where ever it might be found.

That same day, a Santa Clara Superior Court judge issued the search warrant and ordered that Exhibit A be sealed.

Case No. CC647999

On May 11, 2006, Officer Roberson searched defendant's home. In the kitchen on the counter, the officer found a small amount of methamphetamine in a container with alcohol. A clear plastic baggie containing one-tenth of a gram of methamphetamine was found on a dresser in the master bedroom. Some firearm ammunition and a large knife with a knuckle attachment of spikes were also found. Defendant was the only person at home at the time. Defendant was sweating profusely, had dry, cracked lips, dilated pupils and fluttery eyelids, leading Roberson to conclude that defendant was under the influence of a central nervous system stimulant. A blood sample taken from defendant tested positive for methamphetamine.

On November 9, 2006, an information was filed charging defendant with possession of methamphetamine (count 1), possession of ammunition by a prohibited person (count 2), possession of metal knuckles (count 3), being under the influence of a

controlled substance (count 4, a misdemeanor), and possession of controlled substance paraphernalia (count 5, a misdemeanor). (Health & Saf. Code, §§ 11377, subd. (a); 11550, subd. (a); 11364; Pen. Code, §§ 12316, subd. (b); 12020, subd. (a)(1).)

Case Number CC753922

On January 9, 2007, San Jose Police Officer Brian Shab stopped a car driven by defendant. Codefendant Carlos Bosquiz was a passenger in the front seat. Defendant exhibited symptoms of being under the influence of a central nervous system stimulant. A blood sample taken from defendant tested positive for methamphetamine. A plastic baggie found on the floorboard of the car between the driver's and passenger's seats contained 1.97 grams of methamphetamine.

On January 12, 2007, an information was filed charging defendant with possession of methamphetamine (count 1), being under the influence of a controlled substance (count 2, a misdemeanor), and one prior prison term. (Health & Saf. Code, §§ 11377, subd. (a), 11550, subd. (a), Pen. Code, § 667.5, subd. (b).)

On February 20, 2007, defendant filed a motion to disclose the identity and whereabouts of the confidential informant.

On April 2, 2007, defendant was arraigned on both informations and pleaded not guilty. On August 31, 2007, defendant moved to unseal the sealed portion of the affidavit, and quash and/or traverse the search warrant. On September 18, 2007, the court conducted an in camera review of the sealed affidavit and subsequently denied the motions. Apparently, the court also denied the earlier motion to disclose the identity of the informant at that same time.

Six months later, on March 5, 2008, defendant renewed his motion to suppress the evidence seized pursuant to the search warrant, arguing that the affidavit, including the sealed portion, failed to provide probable cause to believe that phenylacetone would be found in defendant's possession. On March 18, 2008, the prosecution agreed to relitigate

the matter. Officer Roberson was present at the hearing and gave the court the original sealed portion of the affidavit. The court reviewed both the sealed and unsealed portions of the affidavit and denied the motion, ruling that issuance of the warrant was supported by probable cause. At the prosecutor's request, the court ordered that the envelope with the sealed warrant to be "withdrawn and given back to the custody of the officer until further order of the court."

On April 7, 2008, defendant changed his pleas to all the counts in both informations to no contest and admitted the prior prison term allegation. On June 6, 2008, the court granted defendant probation in both cases.

DISCUSSION

On appeal, defendant contends that "it is highly likely the trial court did not follow the step-by-step procedural dictates handed down" in *Hobbs*, *supra*, 7 Cal.4th 948. He bases this supposition on the court's comments when it denied defendant's motions to disclose the informant, suppress evidence and quash the warrant in open court after it conducted its in camera review.[1] Specifically, defendant complains that the trial court did not follow the in camera procedures in the precise order set forth in *Hobbs*. For example, defendant asserts that the court did not determine, first and second, that the confidential informant's identity should remained sealed, to the extent necessary to protect his or her identity from disclosure. Next, he alleges that the court did not address his motion to traverse in step three, called no witnesses and reviewed no supplemental

[1] The court stated: "I found nothing in the affidavit that would exculpate the defendant. I further found no inconsistencies in the affidavit in terms of what's been presented here. Therefore, I find that the identity of the confidential informant must be preserved, and that any portion – redacting a portion of the affidavit would not accomplish that purpose and would – the affidavit in its entirety would reveal the identity of the confidential informant and, therefore, the motion will be denied." The court denied defendant's motion to quash the warrant on the "same basis."

materials, thereby rendering "in vain" his request (in the written motion) to submit written questions. Finally, defendant claims that "the trial court looked only at the statements on the face of the sealed affidavit to rule, if at all, on [his] motion to quash." In defendant's view, the trial court's stated ruling does not "inspire confidence that the court made the requisite determination of whether there exists 'a fair probability' based on the 'totality of the circumstances' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant." Therefore, defendant requests that we review the sealed transcript of the in camera hearing and the sealed search warrant affidavit to determine whether the trial court erred in denying his motion to quash.

The Attorney General disputes that the trial court's ruling in open court demonstrates error, but he concurs that "only this court can determine whether the trial court abused its discretion" and voices no opposition to this court's independent review of the record, including the sealed portions.

Penal Code section 1534, subdivision (a), provides that the contents of a search warrant, including the supporting affidavit setting forth the facts establishing probable cause for the search, become a public record once the warrant is executed and returned.[2] However, in *Hobbs*, our Supreme Court held that if certain procedures are followed to preserve the defendant's right to challenge the validity of a search warrant, a major portion – or even all – of the search warrant affidavit may be sealed to protect the identity of a confidential informant. (*Hobbs, supra*, 7 Cal.4th at pp. 971-975.) On a properly noticed motion by a defendant to quash or traverse the warrant, the trial court must conduct an in camera hearing after allowing the defendant to submit written questions to

[2] Penal Code section 1534, subd. (a) provides in relevant part: "A search warrant shall be executed and returned within 10 days after date of issuance. . . . The documents and records of the court relating to the warrant need not be open to the public until the execution and return of the warrant or the expiration of the 10-day period after issuance. Thereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record."

be asked of any witness called to testify at the hearing. (*Id*. at p. 973.) At the hearing, the court is to determine whether the affidavit has been properly sealed (*id*. at pp. 972-973), and whether, under the totality of the circumstances presented in the entire affidavit and any testimony presented to the court, there was a fair probability that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. (*Id*. at p. 975.) Where a motion to traverse has been filed, the court is to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause. (*Id*. at p. 974) "In all instances, a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record along with the public portions of the search warrant application for possible appellate review." (*Id*. at p. 975.)

In the course of conducting our review of defendant's claim, it became apparent to this court that the trial court's method of maintaining the officer's sealed affidavit in this case did not comport with the procedures subsequently established by our Supreme Court in *People v. Galland* (2008) 45 Cal.4th 354. Accordingly, on November 6, 2009, this court caused the original affidavit to be returned to the superior court for authentication.[3]

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[3] This court's order stated in relevant part:

"Defendant having asked this Court to review the sealed affidavit supporting issuance of search warrant number 34165 on May 8, 2006, this Court requested that the Santa Clara County Superior Court transmit the sealed affidavit to us. On October 22, 2009 this Court lodged a sealed affidavit delivered by a San Jose Police Department officer.

"The Clerk of the Sixth Appellate District is now directed to return the original sealed affidavit to the San Jose Police Department.

"The Clerk of the Santa Clara County Superior Court is directed to obtain the original sealed affidavit from the police department and maintain it under seal within the court. The Santa Clara Superior Court is further directed to verify whether the sealed affidavit obtained from the San Jose Police Department is the same affidavit that was presented by Officer Michael Roberson to the magistrate, the Honorable Paul R. Teilh, on May 8, 2006; to the Honorable Ralph E. Brogdon on September 18, 2007; and to the Honorable Andrea Y. Bryan on March 19, 2008. The superior court may consider all relevant matters, including the chain of custody pertaining to the sealed affidavit. The superior court shall make written findings.

Neither defendant nor the Attorney General has filed a supplemental brief challenging that procedure. Accordingly, pursuant to our order, the appellate record has now been augmented to include the authenticated sealed and unsealed portions of the search warrant and return, affidavit, and the record of the authentication process.

Judge Brogdon[4] impliedly found that the confidential informant was not a material witness on guilt or innocence ["nothing in that affidavit . . . would exculpate the defendant"] (Evid. Code, § 1042, subd. (d)), and therefore his or her identity need not be disclosed. He also found that the affidavit was properly sealed to protect the informant's identity, and that redaction would not provide sufficient protection. He also determined that the sealed and unsealed portions of the affidavit did not disclose any insufficiencies or inconsistencies that undermined the existence of probable cause, and that probable cause supported issuance of the search warrant.

After independently reviewing the authenticated record, including the sealed portion of the affidavit and the transcript of the in camera hearing, we agree with the trial court that the informant's identity was properly protected from disclosure, that if the information in the sealed document were disclosed, the identity of the confidential informant would be revealed, and that redaction would not have sufficiently protected his or her identity from disclosure. Thus, the confidential affidavit was properly ordered

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"The superior court is directed to augment the record on appeal with its written findings; the sealed portion of the affidavit; the public portion of the affidavit; and the search warrant and return.

"Pursuant to *People v. Galland* (2008) 45 Cal. 4th 354, the superior court shall maintain a sealed copy of the affidavit as part of the court record. (*Id*. at p. 745.)

"The superior court shall transmit all of the augmented materials to this Court, and all except the sealed portions to the parties, within 30 days of this order. If the parties wish to submit supplemental letter briefs, they may do so within 15 days of their receipt of augmentation."

[4] In his reply brief, defendant expressly disavows that he seeks review of Judge Bryan's March 18, 2008 denial of his "second, redundant motion to quash."

sealed. (*Hobbs*, *supra*, 7 Cal.4th at pp. 972-973.) In addition, we also find no "reasonable probability that defendant would prevail on the motion to traverse—i.e., a reasonable probability, based on the court's in camera examination of all the relevant materials, that the affidavit includes a false statement or statements made knowingly and intentionally, or with reckless disregard for the truth, which is material to the finding of probable cause . . . ." (*Id*. at p. 974.) Finally, we find that, under the totality of the circumstances presented in the search warrant affidavit and during the in camera hearing before Judge Brogdon, there was a fair probability that contraband or evidence of a crime would be found in the residence searched pursuant to the warrant. (*Id*. at p. 975.) Accordingly, no Fourth Amendment or due process violation occurred.

We reject defendant's suggestion that to satisfy *Hobbs*, the trial court must always call witnesses or review materials supplemental to the affidavit when conducting its in camera review. Although *Hobbs* did observe that for the purposes of reviewing a motion to traverse, supplemental materials "will invariably include such items as relevant police reports and other information regarding the informant and the informant's reliability" (*id*. at p. 973), it also stressed that the trial court "may, in its discretion, find it necessary and appropriate to call and question the affiant, the informant, or any other witness whose testimony it deems necessary to rule upon the issues." (*Ibid*.) In our view, the decision whether to review supplemental materials is also discretionary, and necessarily depends on the particulars of the case before the trial court. In this case, we find no abuse of discretion in the trial court's decision not to ask for supplemental materials. We also note that the appellate record does not disclose that defendant ever submitted any written questions to the judge, or that the court refused to ask the affiant or any other person questions submitted by the defense.

Finally, to the extent that defendant implicitly contends that his conviction must be reversed and his case remanded for a new in camera hearing consistent with *Hobbs*,

because the trial court's *articulation* of its findings did not mirror the logical, step-by-step progression set forth in *Hobbs*, we reject that contention. In our view, what is important is that the trial court make a record from which the appellate court is able to determine whether or not the trial court followed the in camera review procedures set forth by *Hobbs*, made all of the requisite findings, and did or did not abuse its discretion. We have independently reviewed the appellate record in this case, including the transcript of the in camera hearing and the sealed and public portions of the search warrant affidavit, and we are satisfied that there is no basis for reversal under *Hobbs*. (See Cal. Const., art. VI, § 13; see also Cal. Const., art. I, § 28, subd. (d); *People v. Bradford* (1997) 15 Cal.4th 1229, 1291 [federal constitutional standards govern search and seizure issues under California Constitution, article I, section 28, subdivision (d)]; *Illinois v. Gates* (1983) 462 U.S. 213, 238.)

CONCLUSION

Having conducted an independent review of the entire record, we conclude that the trial court properly discharged its duties under *Hobbs*. The court did not abuse its discretion in denying defendant's motions to disclose the informant, quash or traverse the warrant, or suppress evidence.

DISPOSITION

The judgment is affirmed.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.